STATE OF MICHIGAN
IN THE SUPREME COURT

****

Appeal from the Court of Appeals
The Honorable William C. Whitbeck, the Honorable Peter D. O'Connell and the Honorable Patrick M. Meter

****

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

-vs-

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendants-Appellee.

_____/

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

SECREST WARDLE

APPELLANT CITY OF NOVI'S REPLY TO THE APPELLEES' "RESPONSE" BRIEF

Respectfully submitted,

SECREST WARDLE

BY: GERALD A. FISHER (P 13462)
THOMAS R. SCHULTZ (P 42111)
STEVEN P. JOPPICH (P 46097)
Attorney for City of Novi
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

Dated: April 1, 2005

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30903 Northwestern Highway
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Farmington Hills, MI 48333-3040
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INTRODUCTION

The Adells claim that the City's reply brief introduces matters "outside the record," referring to three letters included in the City's supplemental appendix. These letters were submitted ***by the Adells*** to the trial court as attachments to their trial brief. That brief and its attached exhibits are most certainly part of the record before this Court—and the Adells know this, because they, too, referred this Court to exhibits from that very same trial brief no fewer than three times in their own brief on appeal.[1]

The Adells object that the letters refer to the potential "donation" by the Adells of the property at issue. They claim that the City stipulated that "donation" would not be an issue at trial, and wonder why the City never referred to those documents in prior submissions. Yet the Adells in their brief on appeal to this Court accuse the City—for the first time in their filings—of "falsely" representing to the State of Michigan (in an MEDC application) that the Adells would donate the property at issue, squarely raising the donation question. The City cannot let that mischaracterization stand, and the documents attached to the City's supplemental appendix prove the allegation to be flatly untrue.

No doubt the real motivating factor behind the response brief, then, is the chance to address the City's substantive arguments with regard to both the 2004 aerial photograph, which proves that the Wisne curb cut onto Grand River was not in fact "eliminated" as the Adells suggested, and the merits of the City's public use argument. The Adells' offerings on these issues are unpersuasive. While the City has tried from the very first day of this case to focus the reviewing courts on the law, it appears necessary as a result of the response brief to yet again address the Adells' factual assertions, which the City does only to clarify the record and issues before the Court.

[1] Appellee's Brief on Appeal, pp 2 (note 6) and 12 (notes 47 and 48).

I. *The Documents To Which The Adells Object Are In Fact Part Of The Record—Put There By The Adells Themselves.*

Under MCR 7.311(A), an appeal to this Court is heard on "the original papers," which constitute the record on appeal. The Court of Appeals' clerk (or lower court clerk) is to send this Court "all papers on file in the Court of Appeals or the lower court, certified by the clerk." The August 13, 1992, letter from the Adell Brothers Children's Trusts expressly referring to the dedication and donation of their property ***in connection with the MEDC grant application*** is attached to the Adells' initial brief challenging the public use issue[2] as Exhibit C. The March 18, 1998, letter from Juliet Rowley (actually, the one-page portion of it attached to the City's supplemental appendix) is attached to that brief as Exhibit D. The August 13, 1992, letter is also attached to the Adells' subsequent trial brief as Exhibit J;[3] the February 24, 1995, draft letter from the Novi Expo is Exhibit O and the Rowley letter dated March 18, 1998 (both pages) is Exhibit S. The Adells' statement that these documents are "outside the record" is unworthy.

The Adells suggest that the City's reference to this material signifies a shift in the City's earlier arguments. Nothing could be further from the truth. The City took the position in both lower courts that the detailed factual evidence that the Adells were "marshaling" with regard to the City's true intentions (i.e., securing the state grant) was more or less irrelevant to the legal claim that the Adells had brought challenging public use.[4] The City even stipulated that it was not making a legal "claim" that the Adells had already given the property at issue to the City of Novi. The entire exchange is quoted at page 2 of the Adells' response brief, and it shows that the Adells were

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[2] The Appellant's Appendix, page 3a, confirms the filing, on December 14, 1998, of a brief by the Adells in support of their motion challenging public purpose and necessity.

[3] The Appellant's Appendix, page 6a, confirms the filing on April 20, 1999, of Defendant's trial brief in support of challenge to public purpose and necessity.

[4] The City always asserted that the Adells had never really challenged necessity, and the Adells themselves confirmed in their opening statements at the hearing that the ***only*** basis for their "necessity" challenge is that the City lacked current funds for the project and therefore lacked a current ability to construct either the ring road or the industrial spur. The

concerned about actual ***claims*** by the City of Novi that they were entitled to the donation of the Adells' property—hence the reference to pleadings and a defense based on the statute of frauds. The City's stipulation confirmed that the City was not seeking a ruling by the Court forcing the transfer. It does not, however, somehow prevent the City from defending against the allegations now asserted by the Adells that the City affirmatively ***misrepresented*** to the State of Michigan the Adells' intention to donate the property.

The August 13, 1992, letter on behalf of the Adell Brothers Children's Trusts to the City of Novi—attached to ***two*** of the Adells' trial court briefs—could not be clearer: "We have reviewed the preliminary plans provided us through JCK & Associates in your Planning Community Development Department. After reviewing these plans and subject to final details, ***we would be willing to dedicate and donate the necessary right-of-way for those portions of the road system which fall on the trust property.*** * * * Please accept this communication as our indication of support. We would appreciate being kept apprised of the City's progress with regards to ***this grant.***" (Emphasis added.) The City obtained this document for the ***very purpose*** of making sure that its representations to the MEDC were true.[5]

The Adells continue to assert that the August 13, 1992, letter only related to the ring road. That, too, is categorically indefensible. The Adells' took great pains to establish at trial that the 1992 MEDC application to which this letter was directed included ***both*** the ring road and the spur road.[6] To say that the Adells in their letter only meant to refer to the ring road (which just encroached on the corner of the Adells' property) when there is nothing in the letter that says

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City, therefore, focused on the public ***use*** aspect, rather than the public necessity aspect of the case. (Appellant's Appendix, pp 220a-221a; Adells' opening statement.)

[5] While it related to the 1992 grant, there is nothing in the record to indicate that the Adells' position changed with regard to the later 1993 application.

[6] Appellant's Second Supplemental Appendix, pp 328a-329a.

anything remotely like that is the legal equivalent of saying that they had their fingers crossed behind their back.

The Adells never made the argument in the trial court or in the Court of Appeals that the City "falsely represented"[7] or "affirmatively and falsely stat[ed]"[8] to the State of Michigan that the Adells intended to donate the property, and certainly did not have a whole separate section in their recitation of facts below actually entitled "The City Submits a New Application Misrepresenting. . . ."[9] So while the City might not have felt compelled to address the specifics of the Adells' discussions in its previous filings—concentrating on the public use aspect of the case—it will not stand mute against those baseless allegations.

The most curious aspect of that new position by the Adells is just how at odds it is with the way they addressed the question in the trial court. Counsel for the Adells questioned the individual who signed the MEDC application, Mike Csapo, a former staff planner with the City, directly at the hearing, and never once asked him whether that representation was false. Counsel did, however, elicit from Mr. Csapo confirmation that he (Csapo) "was under the impression that Mr. Bowman [of the Novi Expo] could speak competently regarding the Adells' position on this project."[10] That statement pretty well supplies the context for the two other documents that the Adells' object to the City using: the February 24, 1995, draft letter from Novi Expo, indicating that Novi Expo believed that the donation would occur, and the March 18, 1998, letter from Juliet Rowley that is the first indication actually in the record below that the donation would not occur.

The City noted these documents from the record below not as some sort of "claim" to which a statute of frauds defense needs to be asserted, but rather as the context for, for example, the July 7,

[7] Appellee's Brief on Appeal, p 15.
[8] Appelee's Brief on Appeal, p 46.
[9] Appellee's Brief on Appeal, p 14.
[10] Appellant's Second Supplemental Appendix, p 338a.

1995, letter from Mr. Kriewal to Wisne seeking additional funds for construction of the project. Contrary to the Adells' assertions, the City did believe—whether correctly or not, and regardless of whether, in retrospect, the City should have known better or should have talked to somebody else about the issue—that the spur road improvement itself was not objectionable and that the property acquisition for that purpose would not be an issue. While the Adells apparently think that Mr. Kriewal's efforts to secure additional money for the improvements were heavy-handed (or worse), a review of the ***entire record***, including documents that the Adells themselves made part of that record, confirms that the letter had nothing to do with the Adells or the property acquisition, and had everything to do with Mr. Kriewal's efforts, well-executed or not, to find the funds for an improvement that he clearly expected no objection to. The Adells' theory that the City applied for the grant and made the improvement plans either knowing that the Adells objected to the spur, or despite that objection, or without ever bothering to check with the Adells on the issue, is just not credible. Clearly, the City considered the Adells on board at that point.

In this regard, it is both telling and undeniable that the Adells can point to ***nothing*** in the record below after their 1992 letter to verify their alleged opposition to the industrial spur—no letter to the City, no record of a telephone call or a meeting, no minutes of a City Council meeting, nothing whatsoever—until the 1998 Rowley letter included in the City's supplemental appendix. And the 1992 letter of support, despite the Adells' argument to the contrary, must be read to include the spur road. ***That*** is the true context of the City's efforts below, which this Court is entitled to know.

II. The Adells' Efforts To Rehabilitate The 2004 Aerial Photograph Are Unconvincing

The record below is absolutely replete with assertions by the Adells that the Wisne curb cut onto Grand River was to be "closed" or "eliminated"[11] and could be "replaced," [12] the implication

[11] Appellee's Brief on Appeal, pp 8, 9, 10, and 18; Appellant's Appendix, pp 228a, 279a, 280a, 281a, 290a, 291a, and 292a.

being that it would be somewhere else on Wisne land. The trial court opinion seems to assume this was the case.[13] So does the Court of Appeals.[14] The Adells' brief on appeal is meant to leave the Court with the impression that this elimination/relocation in fact occurred. The City's purpose in its reply brief was to make clear to this Court that there was no elimination of the driveway, and no replacement of the driveway somewhere else on the Wisne property.

The Adells' position on this point is now clear: if the County could leave the curb cut where it was, with some minor modifications of grade to meet the new road profile, the curb cut must be just fine now—the equivalent, from a public safety standpoint, of the proposed ring road/spur reconfiguration. The Adells ask this Court to ignore two things. The first is that it is the ***location*** of the curb cut even without the ring road—essentially at the bottom of the bridge, causing the sharp and difficult left-hand turn onto Grand River out of that curb cut, regardless of any change in its grading to meet the new road profile for Grand River—that caused both the County and the City to want to eliminate it. The second is that, regardless of changes in the profile of Grand River, the curb cut is too close to where the proposed ring road would have met Grand River: right-hand turns out of the ring road to go west on Grand River would directly conflict with left-hand turns out of the curb cut to go east onto Grand River. Putting that curb cut somewhere else along Grand River actually puts it ***closer*** to the ring road, making things even worse. Stated otherwise, it was not the grading of the driveway that made it dangerous, it was ***the fact that it was there at all,*** in the location where it now remains. The Adells cannot use the fact that the County left the curb cut in place to get out of their stipulation that it is dangerous; removing that awkward access from the highly-traveled, high-speed major thoroughfare and replacing it with the alternative ring road/spur road access is a clear public safety improvement, which is why the Adells did not contest it below.

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[12] Appellee's Brief on Appeal, pp 9, 18, and 19; Appellant's Appendix, pp 281a.
[13] Appellant's Appendix, p 301a.

The City's point in the Court of Appeals below and in its initial application for leave to appeal in this Court was that without the combination of the ring road and the industrial spur as public road access the curb cut onto Grand River could not be closed, no matter how helpful that would be to the public safety and welfare. The City asserted—correctly, it turns out—that the County would not risk an ***inverse*** condemnation claim by closing the only existing public road access to the Wisne property. While the County has the right to close a curb cut to its roadway as a general proposition, it would be reckless for it to do so without an alternative and equivalent ***public*** road access being available. See e.g., Goodfellow Tire Co. v. Hurlbut[15] for a general discussion of rights of abutting property owners to reasonable public access to public roads. As noted in the City's earlier reply brief, the private easement over the Expo Center parcel, the terms of which were not made part of the record below, but which the Court of Appeals below found would keep the Wisne parcel from being "landlocked,"[16] apparently did not appeal to the County.

Whatever one wants to call the potential elimination of the curb cut—a public benefit, a public good, a public purpose, a public use, or just an act in furtherance of the commonweal—it did not happen, because the trial court and the Court of Appeals decided that the industrial spur benefited Wisne more than the elimination of that dangerous curb cut benefited the public traveling on Grand River, including the hundreds of employees and vendors and visitors who would use that curb cut—all of whom we know to exist because the Adells attached to their appendix in this Court the July 23, 1992, letter from Wisne to the City documenting some 308,000 square feet of then-existing buildings and some 300 existing employees, with construction underway of another 150,000

[14] Appellant's Appendix, p 312a.
[15] Goodfellow Tire Co. v. Hurlbut, 163 Mich. 240; 128 N.W. 410 (1910). See also, Antieau on Local Government Law (2d ed.), §30.18[5] for a discussion of the right to close access to one street if alternative access is available.
[16] Appellant's Apendix, p. 212a, COA Opinion, p 9.)

square feet of building to house 75-100 new employees.[17] For all the reasons the City argued in its brief on appeal, that inquiry and conclusion by the lower courts were incorrect.

III. The City's Reply Brief Did Not Change Its Position With Regard To The Public Use Inquiry By The Courts

The lower courts in this case found that a publicly-owned and publicly-maintained road, from which the public was in no way excluded, was actually a private road. [18] They did so on the basis of a test requiring the "balancing" of public and private benefits that was established in a case (Poletown)[19] that has now been overruled by this Court (Hathcock).[20] The Adells want the courts of this state to undertake this balancing test for every public infrastructure improvement—roads, sewers, water lines, storm drains—that results in an identifiable benefit to private individuals or entities. That includes, almost literally, every public infrastructure improvement project imaginable.

The trial court hearing in this case took three days, and that was without the City, frankly, putting much factual evidence into the record, because it was focused instead on the public use aspect of the road at issue—its public ownership, the public safety benefits of the elimination of the Grand River curb cut, etc. Imagine the length of the hearing had the City fully cross-examined all the witnesses and fully examined even its own various experts. Now multiply that by the number of

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[17] Appellee's Appendix, p 2b-3b.

[18] "**Public**. 1. of, pertaining to, or affecting the people as a whole or the community, state, or nation: *public funds; a public* nuisance. 2. done, made, acting, etc., for the people or community as a whole: *public prosecution*. 3. open to all the people: *a public meeting*. 4. pertaining to or engaged in the affairs or service of the community or nation: *a public official*. 5. maintained at the public expense and under public control and open to the public generally: *a public library or road*. 6. open to the view or knowledge of all; existing, done, etc., in public: *The fact became public*. 7. widely known to the public; prominent: *public figures*. * * * ."

"**Private**. 1. belonging to some particular person or persons: *private* property. 2. pertaining to or affecting a particular person or a small group of persons; individual; personal: *for your private* satisfaction. 3. confined to or intended only for the person or persons immediately concerned; confidential: *a private* meeting. 4. personal and not publicly expressed: *one's private feelings in a* controversy. 5. not holding public office or employment: *a group of private* citizens. 6. not of an official or public character: *to retire to private* life. 7. removed from or out of public view or knowledge; secret: *the private papers of President* Wilson. 8. not open or accessible to the general public: *a private beach*. 9. without the presence of others; alone; secluded. * * * ."

The Random House Dictionary of the English Language, Unabridged, 1973.

[19] Poletown Neighborhood Council v. Detroit, 410 Mich. 616; 304 N.W.2d. 455 (1981).

[20] Wayne Co. v. Hathcock, 471 Mich. 445; 684 N.W.2d. 765 (2004).

public infrastructure projects that occur every day across the state, and then add those cases to the trial court dockets of this state. That is the equation that the Adells propose here.

And they propose it on the basis of pre-Poletown cases that involved, for example, a statute that allowed the condemnation of property in part for the leasing of building space to a private commercial enterprise (Shizas),[21] the flooding of property for the creation of a water power source that could be used for private purposes (Berrien),[22] and the intended transfer of property to private third parties (In Re Slum Clearance),[23] along with a post-Poletown case involving a private cable company with an exclusive (and exclusionary) right to use the property (Edward Rose).[24]

The City has not, as the Adells claim, retreated from any position taken in this case. A road that is in fact a public road—owned, controlled, and maintained by the public, and open at all times to the public, with no ability on the part of any private individual or entity to exclude the public—is a ***public use*** as a matter of law. It satisfies the "actual use" test referred to by Justice Cooley and all the other commentators and cases referred to in the City's brief on appeal. The Adells' assertion that this position by the City somehow means that there is no judicial review of a decision to establish a public road is transparently false. A decision to establish a public road is subject to review for fraud, abuse of discretion, and clear error of law as a ***public necessity*** inquiry. And under some circumstances, a property owner might well be able to invoke some other constitutional principles not found in the public use/just compensation clause of art. 10, §2 of the 1963 state constitution.

The City has not changed its position that public roads were commonly understood, by those knowledgeable in the law, to be actual public uses much like the street railways in the Cleveland v

[21] Shizas v. City of Detroit, 333 Mich. 44; 52 N.W.2d. 589 (1952).
[22] Berrien Springs Water-Power Co. v. Berrien Circuit Judge, 133 Mich. 48; 94 N.W.2d. 379 (1903).
[23] In Re Slum Clearance, 331 Mich. 714; 50 N.W.2d. 340 (1951).
[24] City of Lansing v. Edward Rose Realty, Inc., 442 Mich. 622; 502 N.W.2d. 638 (1993).

City of Detroit,[25] in which this Court simply stated that the use was public and moved on to the question of public necessity. The City also still asserts that those knowledgeable in the common law of public use in Michigan in 1963 would have been unaware of any case (because no such case existed then and does not exist now) in which a public infrastructure improvement owned, controlled, maintained by the public, and from which no private individual could exclude any other member of the public, was found to be a private infrastructure improvement.

CONCLUSION

At a time when municipalities around the country are debating the sale of naming rights for their public parks and ball fields to private corporate sponsors to raise monies for their general funds, the City's efforts to accomplish this road improvement project, by coordinating property acquisition and road design and construction schedule efforts with other public agencies and financing authorities—a difficult juggling act, involving a lot of people and entities with different functions, tasks, and objectives, under the very best of circumstances—must be seen as reasonable. So were its efforts to address the concerns of a large, industrial property owner whose only access onto a major public road the City hoped to eliminate for public safety purposes. The record below shows the real-life operations of an actual, working local government—maybe not the Platonic ideal of a road project, but a certainly typical one, which the Court must keep in mind as it forms its opinion.

Respectfully submitted,

SECREST WARDLE

BY: _____

GERALD A. FISHER (P 13462)
THOMAS R. SCHULTZ (P 42111)
Attorneys for City of Novi
30903 Northwestern Highway
Farmington Hills, MI 48333-3040
(248) 851-9500

Dated: April 1, 2005

[25] Cleveland v. City of Detroit, 322 Mich. 172; 33 N.W.2d. 747 (1948).

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PROOF OF SERVICE

GERALD A. FISHER (P13462)
THOMAS R. SCHULTZ (P42111)
Attorneys for Plaintiff-Appellant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

DAVID M. FRIED (P13710)
LOUIS D. BUGBEE (P32603)
DENNIS WATSON (P31300)
Former Attorneys for Plaintiff-Appellant
41800 W. 11 Mile Road, Suite 115
Novi, MI 48375-1818
(248) 380-2000

H. ADAM COHEN (P47202)
Attorney for Defendants ADELL
28400 Northwestern Highway, Suite 120
Southfield, MI 48034-8346
(248) 356-5888

JOHN C. BOWEN (P42778)
Attorney for Defendants EXPO CENTER
43700 Expo Center Drive
Novi, MI 48375
(248) 348-5600

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

Jean E. Seefeld, first being duly sworn, deposes and states that on the 1st day of April, 2005, she served a true copy of the within ***Plaintiff-Appellant City of Novi's Reply to Appellees' Response Brief***, upon:

H. ADAM COHEN
Attorney for Defendants ADELL
28400 Northwestern Highway, Suite 120
Southfield, MI 48034-8346

JOHN C. BOWEN
Attorney for Defendants EXPO CENTER
43700 Expo Center Drive
Novi, MI 48375

by depositing same in the United States mail with postage fully prepaid thereon.

Jean E. Seefeld

Subscribed and sworn to before me this
1st day of April, 2005.

Elizabeth A. Maher
Notary Public
Oakland County, Michigan
My Commission Expires: July 4, 2008

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ELIZABETH A. MAHER
NOTARY PUBLIC OAKLAND CO., MI
MY COMMISSION EXPIRES Jul 4, 2008